

124 FERC ¶ 61,010
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Louisiana Public Service Commission

v.

Docket No. EL08-51-000

Entergy Corporation
Entergy Services, Inc.
Entergy Louisiana, LLC
Entergy Arkansas, Inc.
Entergy Mississippi, Inc.
Entergy New Orleans, Inc.
Entergy Gulf States Louisiana, Inc.
Entergy Texas, Inc.

ORDER ON COMPLAINT AND ESTABLISHING HEARING
AND SETTLEMENT JUDGE PROCEDURES

(Issued July 2, 2008)

1. On March 31, 2008, the Louisiana Public Service Commission (Louisiana Commission) filed a complaint pursuant to sections 205 and 206 of the Federal Power Act (FPA)¹ seeking to correct alleged errors in and deviations from the methodology being used by Entergy Services, Inc. (Entergy) to calculate rough production cost equalization among the Entergy Operating Companies² (Operating Companies). As discussed below, we will dismiss seven of the issues raised by the Louisiana Commission, grant its complaint with respect to one issue and set the remaining two issues for hearing and settlement judge procedures.

¹ 16 U.S.C. § 824d and § 824e (2000 and Supp. V 2005).

² The Entergy Operating Companies are: Entergy Arkansas, Inc. (EAI), Entergy Gulf States Louisiana, Inc. (EGSL), Entergy Louisiana, LLC (ELL), Entergy Mississippi, Inc. (EMI), Entergy New Orleans, Inc. (ENO), and Entergy Texas, Inc. (ETI). EGSL and ETI formerly comprised Entergy Gulf States, Inc. (EGS).

I. Background

2. In Opinion No. 480, the Commission found that rough production cost equalization had been disrupted on the Entergy system.³ The Commission concluded that if the addition of resources to the Entergy system did not maintain rough production cost equalization, then an annual bandwidth of +/- 11 percent would be utilized to keep the Entergy system in rough production cost equalization,⁴ i.e., only if total production costs of one or more Operating Companies deviate from the system average total production cost by more than +/- 11 percent would the bandwidth become applicable. The end result of the application of the bandwidth remedy would be the potential reallocation of costs from Operating Companies with low production costs to Operating Companies with high production costs.

3. In an order accepting Entergy's compliance filing to incorporate the bandwidth remedy into the Operating Companies' System Agreement, the Commission required Entergy to comply with the requirements of Opinion Nos. 480 and 480-A, and stated that Entergy may not make adjustments in its compliance filing to Exhibits ETR-26 and ETR-28, which set forth the methodology to be used and were adopted in those orders.⁵ Exhibits ETR-26 and ETR-28 calculated the production costs of the Operating Companies for the purpose of determining production cost disparities on a cents-per-kilowatt-hour basis. The production cost calculation includes production plant investment cost and operation and maintenance expenses reported in various accounts under the FERC Uniform System of Accounts. The Commission also stated that parties seeking changes to the bandwidth formula adopted in Opinion No. 480 must make separate filings under section 205 or 206 of the FPA in order to implement such changes.⁶

4. On May 29, 2007, in Docket No. ER07-956-000, Entergy submitted its first annual bandwidth formula implementation filing, containing its calculation of the production costs of each of the Operating Companies for calendar year 2006. The Commission

³ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480, 111 FERC ¶ 61,311, at P 136, *aff'd*, *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, Opinion No. 480-A, 113 FERC ¶ 61,282 (2005).

⁴ Opinion No. 480, 111 FERC ¶ 61,311 at P 144.

⁵ *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 117 FERC ¶ 61,203, at P 69 (2006).

⁶ *Id.* P 69.

accepted the proposed rates for filing, suspended them for a nominal period to become effective June 1, 2007, subject to refund, and established hearing and settlement judge procedures.⁷

II. The Louisiana Commission's Complaint

5. On March 31, 2008, the Louisiana Commission filed a complaint with the Commission identifying seven alleged deviations from the methodology contained in Exhibits ETR-26 and ETR-28, i.e., instances in which, according to the Louisiana Commission, Entergy used incorrect data or included imprudent costs in its implementation filing in Docket No. ER07-956-000. The Louisiana Commission also identifies three alleged errors in Entergy's methodology in calculating production costs for bandwidth purposes, which, it claims, would necessitate an amendment to the currently-effective bandwidth formula.

6. The Louisiana Commission argues that the errors in Exhibits ETR-26 and ETR-28 have the effect of reducing payments from EAI to the other Operating Companies, based on the 2006 test year. The Louisiana Commission argues that these errors make the bandwidth payments unjust and unreasonable. Accordingly, the Louisiana Commission requests that the Commission summarily correct these errors, or in the alternative establish hearing procedures.

A. Deviations From Methodology and the Just and Reasonableness of Cost Inputs

7. The Louisiana Commission believes that (1) matters on which Entergy deviated from the methodology in Exhibits ETR-26 and ETR-28 without authorization pursuant to a section 205 filing and (2) issues related to cost inputs for 2006 that are unjust and unreasonable, including costs that are imprudent, are matters that are properly before the Commission in Docket No. ER07-956-000, the ongoing bandwidth implementation proceeding. With regard to these matters, the Louisiana Commission states that it has raised seven issues in Docket No. ER07-956-000, and expects them to be resolved there. However, the Louisiana Commission states that it is provisionally complaining of these matters in this proceeding to ensure that the issues are preserved in the event the Commission should rule that the issues were not properly raised in Docket No. ER07-956-000.

8. First, the Louisiana Commission argues that Entergy deviated from the methodology in Exhibits ETR-26 and ETR-28 in determining each Operating Company's energy requirements. The Louisiana Commission argues that in the Docket No. ER07-

⁷ *Entergy Servs., Inc.*, 120 FERC ¶ 61,094 (2007).

956-000 proceeding, Entergy determined “net area requirements” by using three values obtained from each Operating Company’s FERC Form No. 1, and that this methodology differs from the methodology used in Exhibits ETR-26 and ETR-28.

9. Second, the Louisiana Commission notes that in Exhibits ETR-26 and ETR-28 the total amount in Account 165, Prepayments for each Operating Company was included in the formula used to determine production costs. The Louisiana Commission argues that Entergy deviated from this methodology by removing the effects of a tax operating loss from Account 165.

10. Third, the Louisiana Commission contends that Entergy changed, without authorization, the accumulated deferred income taxes (ADIT) amounts reflected in the bandwidth calculation. It claims that Entergy adjusted the amounts in Accounts 190 and 282 to exclude numerous ADIT amounts in addition to those that it excluded in Exhibits ETR-26 and ETR-28.⁸

11. Fourth, the Louisiana Commission argues that Entergy changed accounting practices for storm damages that resulted in a reduction in production costs for certain Operating Companies. It contends that these changes are inconsistent with the data used in Exhibits ETR-26 and ETR-28.⁹

12. Fifth, the Louisiana Commission argues that Entergy included unjust and unreasonable cost inputs for depreciation and decommissioning. It argues that depreciation and decommissioning expenses should reflect the expected useful life of a property, which is 60 years in the case of EAI’s ANO-1 and ANO-2 nuclear units. The Louisiana Commission contends that Entergy’s plan to treat the two units as though they have 40-year lives is unjust, unreasonable and unduly discriminatory.¹⁰

13. Sixth, the Louisiana Commission contends that Entergy is proposing to change the ratios used for functionalizing costs for General and Intangible Plant and Administrative and General Expenses (A&G). The Louisiana Commission argues that in applying the ratios, Entergy is introducing a double count in the removal of the A&G expenses for the 30 percent share of the River Bend nuclear unit that was acquired by EGS in a settlement with Cajun Electric Power Cooperative.¹¹

⁸ Complaint at 15.

⁹ *Id.* at 17.

¹⁰ *Id.* at 18.

¹¹ *Id.* at 19.

14. Lastly, the Louisiana Commission contends that Entergy directed EAI to decline an offer to buy back up to 180 megawatts of the Independence 2 steam electric station, then owned by Entergy Power, Inc.¹² The Louisiana Commission argues that Entergy did not conduct a complete analysis of the economics of buying back the power in connection with that decision, and shareholders should pay the costs of imprudence, which should be excluded from the bandwidth calculation.¹³

B. Errors in Methodology (Amendments to the Bandwidth Formula)

1. Spindletop Storage Facility Costs

15. The Louisiana Commission argues that Entergy has improperly failed to include costs for the Spindletop Storage Facility (Spindletop) in EGS's production costs. The Louisiana Commission states that Spindletop consists of a leached salt storage cavern and related natural gas pipelines and equipment located in Sabine, Texas. It adds that the natural gas facility is used as a physical hedge for reliability and pricing purposes and supplies certain EGS gas generating units.

16. The Louisiana Commission states that prior to its merger with Entergy, Gulf States Utilities, Inc. (GSU), the predecessor to EGS, entered into a contract with a third party to finance and build Spindletop. The contract required GSU to pay off the capital costs of the facility through the gas transportation rate over an accelerated time period compared to the useful life of the facility. Once the capital costs were fully paid, this component of the transportation rate dropped to \$0 and GSU could exercise its right to purchase the facility for \$1, which it has since done. The Louisiana Commission contends that GSU initially commenced recovering these costs through its retail fuel adjustment clause. It contends that once it identified these costs in an EGS rate proceeding, the Louisiana Commission directed EGS to refund and defer these amounts and amortize the deferred amounts over the 40-year life of the facilities as if EGS had built the facility itself. The Louisiana Commission argues that the Spindletop costs are production costs, and that the methodology of Exhibits ETR-26 and ETR-28 erroneously fails to recognize them in the production cost comparison.

2. Failure to Exclude Accumulated Deferred Income Taxes

17. The Louisiana Commission argues that the failure to exclude from EGS's production costs the ADIT for the "unregulated" 30 percent share of the River Bend plant is unreasonable. The Louisiana Commission argues that the River Bend 30 percent plant-

¹² Entergy Power, Inc. is a wholly-owned subsidiary of Entergy Corporation.

¹³ Complaint at 21.

in-service costs are considered to be unregulated capacity for EGS, but is sold in its entirety by EGS to ELL and ENO. The Louisiana Commission contends that EGS recovers the costs of the River Bend 30 percent share from ELL and ENO pursuant to Service Schedule MSS-4, and that none of the River Bend 30 percent costs have been included in the production cost bandwidth comparison.¹⁴

18. The Louisiana Commission argues that unlike the River Bend 30 percent plant-in-service and accumulated depreciation, the River Bend 30 percent nuclear depreciation ADIT is reflected in Account 282 along with the other regulated River Bend 70 percent and was allocated in part to the production function, along with all other ADIT amounts in that account through the nuclear production plant ratio. The Louisiana Commission argues that the River Bend 30 percent nuclear depreciation ADIT should not be allocated to EGS's production costs.

19. The Louisiana Commission argues that inclusion of ADIT for the River Bend 30 percent creates a mismatch. It contends that in the production cost calculations, the net plant investment to which the ADIT relates is not included, but the ADIT offset is included. The Louisiana Commission argues that this alleged error in methodology present in Exhibits ETR-26 and ETR-28 renders the production cost calculation unjust, unreasonable and unduly discriminatory.

3. Inclusion of Waterford 3 Capital Lease Amounts in Functionalizing ADIT to Production

20. The Louisiana Commission argues that the bandwidth formula erroneously includes the Waterford 3 capital lease amounts in production costs. The Louisiana Commission explains that the capital lease amount was included in the ratio used to functionalize ADIT to production. The Louisiana Commission argues that the lessor, not ELL, owns the portion of the Waterford 3 unit subject to the lease. It contends that ELL does not depreciate the lease portion for income tax purposes. The Louisiana Commission argues that, therefore, there are no nuclear depreciation ADIT amounts in Account 282 and none of the amounts actually in Account 282 should be allocated to production based on the capitalized lease.¹⁵ The Louisiana Commission argues that this error should be corrected by removal of the Waterford 3 capitalized lease amounts from the computation of the nuclear plant ratio and the production plant excluding nuclear ratio.

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 12.

III. Notice of Filing and Responsive Pleadings

21. Notice of the Louisiana Commission's complaint was published in the *Federal Register*, 73 Fed. Reg. 19,212 (2008), with comments due on or before April 28, 2008. The Arkansas Public Service Commission, the Mississippi Public Service Commission and the Council of the City of New Orleans filed notices of intervention. Occidental Chemical Corporation, Union Electric Company d/b/a AmerenUE and Arkansas Electric Energy Consumers, Inc. filed motions to intervene. Entergy filed its answer to the complaint.

IV. Entergy's Answer

22. Entergy argues that the seven deviation issues raised by the Louisiana Commission are each being litigated in Docket No. ER07-956-000 and involve implementation of the bandwidth formula. Because these issues are each being addressed there, Entergy argues that there is no need for a separate proceeding on these issues and that that portion of the complaint should be dismissed.¹⁶

23. With regard to the three alleged errors in methodology raised by the Louisiana Commission, Entergy argues that two (Spindletop and River Bend ADIT) are without merit and should be dismissed. With regard to the third, Entergy does not oppose the Louisiana Commission's proposed Waterford 3 capital lease amendment.

24. With regard to the proposed Spindletop amendment, Entergy argues that the current bandwidth formula includes accounts containing the as-incurred costs associated with that facility, but not costs associated with prior periods. Entergy argues that it appears that the Louisiana Commission is attempting to reflect in future bandwidth formula calculations Spindletop costs incurred during the period prior to 2005. It states that the Louisiana Commission ordered EGS to refund to customers the entire amount of capital-related Spindletop costs previously recovered by the Fuel Adjustment Clause. Entergy contends that the amount refunded was to be recorded as a regulatory asset, which was to be amortized over the life of the asset (approximately 40 years). Entergy explains that the bandwidth calculation does not reflect any regulatory assets because such assets result from timing differences resulting from retail regulatory decisions. Entergy argues that there is no reason to depart from the methodology inherent in the currently-approved tariff.¹⁷

¹⁶ Entergy April 21, 2008 Answer at 6.

¹⁷ *Id.* at 9.

25. With regard to the River Bend ADIT, Entergy argues that the Louisiana Commission is mistaken in its understanding of the issue. Entergy argues that contrary to assertions by the Louisiana Commission, ADIT for the 30 percent “unregulated” portion of River Bend is excluded from the determination of EGS’s production costs in the bandwidth formula, as currently in effect and as filed in Docket No. ER07-956-000. It argues that the ADIT associated with the 30 percent unregulated share of River Bend is recorded in Account 283, “Accumulated deferred income taxes-Other,” which is an account that is not included in the bandwidth formula. In other words, Entergy argues that it is not necessary to exclude the ADIT associated with the 30 percent unregulated share of River Bend from the formula, because it is not included in the formula. Entergy argues that the issue should be dismissed.

IV. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Commission Determination

27. With regard to the seven issues covering methodology deviation and the justness and reasonableness of cost inputs raised by the Louisiana Commission, we conclude that because these issues are currently before the Commission in Docket No. ER07-956-000,¹⁸ there is no need to establish a separate proceeding to address them. Accordingly, as those issues are before the Commission in Docket No. ER07-956-000, we dismiss that portion of the Louisiana Commission’s complaint that raises those issues.

28. With regard to the Waterford 3 capital lease issue, we note that Entergy does not oppose the Louisiana Commission’s proposed amendment, and we agree with the Louisiana Commission that the inclusion of the Waterford 3 capital lease amounts in production costs in the plant ratios is unjust and unreasonable. Accordingly, to ensure just and reasonable rates, we direct Entergy to remove the Waterford 3 capitalized lease amount from the computations of the nuclear production plant ratio (NPPR) and the production plant excluding nuclear ratio (PPRXN), effective March 31, 2008.

29. With regard to the Spindletop and the River Bend ADIT issues raised by the Louisiana Commission, we find that they present issues of material fact that cannot be resolved based on the record before us and, based on our review of the record, the rates at

¹⁸ *Entergy Servs., Inc.*, 120 FERC ¶ 61,094, at P 16.

issue may be unjust, unreasonable, and unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will institute an investigation and set these issues for a trial-type evidentiary hearing under section 206 of the FPA.

30. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.²⁰ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

31. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b), as amended by section 1285 of the Energy Policy Act of 2005, requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,²¹ we will set the refund effective date at the earliest date possible, i.e., the date of the filing of the complaint, which is March 31, 2008.

32. Section 206(b) of the FPA also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Based on our review of the record,

¹⁹ 18 C.F.R. § 385.603 (2008).

²⁰ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

²¹ See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Electric Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

we expect that if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures or, if the case were to go to hearing immediately, April 1, 2009. We thus estimate that if the case were to go to hearing immediately we would be able to issue our decision within approximately four months of the filing of briefs on exceptions and briefs opposing exceptions, or by October 1, 2009.

The Commission orders:

(A) Entergy is hereby directed to remove the Waterford 3 capitalized lease amounts from the computations of the nuclear plant ratio and the production plant excluding nuclear ratio, effective March 31, 2008, as discussed in the body of this order.

(B) The Louisiana Commission's complaint with respect to the seven issues concerning deviations from the methodology in Exhibits ETR-26 and ETR-28 is hereby dismissed.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the Louisiana Commission's complaint with respect to Spindletop and River Bend ADIT. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(E) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(G) The refund effective date established pursuant to section 206(b) of the Federal Power Act, as amended by section 1285 of the Energy Policy Act, is March 31, 2008.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.